U.S. Supreme Court Review: Key Decisions of 2020-21 Term and Preview of 2021-22 Term

U.S. District Court for the District of Puerto Rico Continuing Legal Education Program

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Major Themes of 2020-21 Term

- The Pandemic Term
- The Barrett Effect
- Beware the Shadow Docket
- "Pack the Court" and Supreme Court Reform Commission

Criminal Justice

TORRES v. MADRID (Opinion by Roberts) (Fourth Amendment)

Key Facts: New Mexico State Police officer defendants approached plaintiff Roxanne Torres sitting in her car in the process of serving an unrelated arrest warrant. When Torres sped away (allegedly thinking the officers were carjackers), the officers shot and hit her 3 times. After fleeing the scene, Torres sought treatment and was later arrested (pleading no contest to certain charges). Afterwards, Torres brought a Sec. 1983 action against the officers, alleging they committed an unreasonable seizure in violation of the Fourth Amendment.

Issue: Is there a seizure for Fourth Amendment purposes when an officer shoots someone who temporarily eludes capture after the shooting?

Held: Yes, the application of physical force to the body of a person with intent to restrain is a seizure, even if the force does not succeed in subduing the person. Remanded for consideration of whether the seizure was unreasonable and other issues such as qualified immunity.

Dissent (Gorsuch/Thomas/Alito): A seizure requires taking physical control or possession of a person, and not merely a physical attempt to seize someone.

LANGE v. CALIFORNIA (Opinion by Kagan) (Fourth Amendment)

Key Facts: As Lange was driving home playing loud music and honking his horn, he passed a California Highway Patrol officer who shortly thereafter attempted to pull him over. Lange proceeded a short distance and turned into his driveway, ultimately pulling into the garage attached to his home. The officer followed Lange into the garage and arrested him on a DUI charge.

Issue: Is the mere pursuit of a person suspected of committing a *misdemeanor* an exigent circumstance justifying a warrantless entry into the home?

Held: No, unless there is a law enforcement emergency justifying not obtaining a warrant prior to entry (e.g., to prevent imminent harms of violence, destruction of evidence, or escape from the home). Remanded for consideration of whether such an emergency justified the officer's entry.

Main concurrence in judgment (Roberts/Alito): A genuine hot pursuit should be considered a categorical exception to the warrant requirement regardless of whether a fleeing person is suspected of having committed a misdemeanor or felony.

CANIGLIA v. STROM (Opinion by Thomas) (Fourth Amendment)

Key Facts: Caniglia was demonstrating suicidal tendencies when the police arrived at the request of his wife to check on him. He agreed to go to the hospital on the condition that the police did not confiscate his firearms. After he left, the police entered his house and confiscated his firearms. Caniglia sued them under Sec. 1983 for violating his Fourth Amendment rights.

Issue: Was the search and seizure justified by a community caretaking exception to the general rule that a warrant is required to enter and search a home?

Held: There is no categorical community caretaking exception to the Fourth Amendment. Exigent circumstances must justify a warrantless search and seizure of a home.

JONES v. MISSISSIPPI (opinion by Kavanaugh) (Eighth Amendment)

Key Facts: Jones was convicted of murdering his grandfather when he was 15 years old. Although the trial court had discretion to sentence Jones to something less than life without parole, he received that sentence.

Issue: Must a court make a factual finding that a minor convicted of murder is permanently incorrigible before sentencing him to a sentence of life without parole?

Held: No; it is sufficient for Eighth Amendment purposes that the sentencing court had discretion to impose such a sentence and it was not mandatory.

Dissent (Sotomayor/Breyer/Kagan): The majority is misreading and effectively overruling SCT precedent that held there must be a finding of permanent incorrigibility before a minor could be sentenced to life without parole.

EDWARDS v. VANNOY (opinion by Kavanaugh) (Sixth Amendment)

Key Facts: In 2007, Edwards was convicted of robbery, rape and kidnapping by a Louisiana jury where only 10 of 12 jurors voted to convict him on some charges, and only 11 of 12 voted to convict him on others. After Edwards state appeals ran out, the SCT decided *Ramos v. Louisiana* (2020) which imposed a unanimous jury requirement on the states as a matter of the Sixth Amendment, overruling a 1972 SCT decision that had permitted non-unanimous jury verdicts.

Issue: Does Ramos apply retroactively to convicts such as Edwards when their convictions are being collaterally challenged on federal habeas review?

Held: No, since Ramos merely announced a new procedural v. substantive rule; and although past cases had suggested a "watershed change" exception to not applying procedural rules retroactively, not only did the unanimous jury requirement not meet that high bar but the existence of such an exception was now being eliminated completely.

Dissent (Kagan/Breyer/Sotomayor): The unanimous jury requirement was a watershed change that should apply retroactively to prior convictions, and the majority was violating principles of *stare decisis* and justice by eliminating the exception.

TERRY v. UNITED STATES (opinion by Thomas) (drug sentencing laws)

Key Facts: In 2008, Terry was convicted by a federal district court in Florida of possessing crack cocaine with an intent to distribute it. He received a sentence of 15.5 years under a career-offender provision of federal law. At the time, other provisions of federal law provided for mandatory-minimum sentences that were triggered much more easily for crack convictions than those involving powder cocaine. Terry, however, was not sentenced under the latter provisions. Starting in 2010, Congress passed sentencing reform measures that effectively reduced mandatory-minimum sentences for crack convictions and made them more comparable to those involving powder convictions. It also made crack convicts eligible for resentencing on a retroactive basis. Terry sought resentencing under these measures.

Issue: Was Terry eligible for resentencing under the reform measures even though he had not been sentenced under the mandatory-minimum laws applicable to cocaine convictions?

Held: No, the new reform laws were clear that they only applied to persons sentenced under the mandatory-minimum provisions and not to persons sentenced under other provisions of federal law.

Civil Constitutional Rights

Freedom of Speech/Expressive Association

MAHANOY AREA SCHOOL DIST. v. B. L. (Opinion by Breyer) (First Amendment)

Key Facts: B.L. was a student in high school and a member of the cheerleading team. Unhappy that she did not make the varsity cheerleading squad, she posted two images on Snapchat (a social media app that allows users to share temporary images with select friends). According to the following passage from the SCT decision:

"The first image B. L. posted showed B. L. and a friend with middle fingers raised; it bore the caption: "Fuck school fuck softball fuck cheer fuck everything." The second image was blank but for a caption, which read: "Love how me and [another student] get told we need a year of jv before we make varsity but tha[t] doesn't matter to anyone else?" The caption also contained an upside-down smileyface emoji."

Some of B.L.'s Snapchat friends were also on the cheerleading team, and the images were shared with the cheerleading coaches. B.L. was then suspended from the team for the upcoming year. B.L. sued the school for violating her free speech rights. The Third Circuit agreed with B.L. on the grounds that the speech occurred off campus, and hence the student speech rules of *Tinker v. Des Moines School Dist.* did not apply (under *Tinker*, schools may generally discipline student speech that substantially disrupts school activities).

Issue: Did B.L.'s suspension from the team violate her free speech rights?

Held: Yes, but we disagree with the Third Circuit that a student's off-campus speech can never be disciplined by schools under the *Tinker* principles. While some off-campus speech might sufficiently implicate *Tinker* concerns about protecting the educational mission of schools to warrant discipline, B.L.'s speech did not sufficiently threaten those interests and, hence, was constitutionally protected. This will be a highly fact-intensive inquiry in each case, and we decline to adopt a general rule that attempts to cover them all.

Dissent (Thomas): State court decisions from the 19th century applied a historical rule that schools can regulate speech when it occurs off campus, so long as it has a proximate tendency to harm the school, its faculty or students, or its programs. The SCT should adopt that rule instead of a vague balancing analysis, and uphold B.L.'s suspension since her speech had the tendency to undermine the authority of the cheerleading coaches.

AMERICANS FOR PROSPERITY FOUNDATION v. BONTA (Opinion by Roberts) (First Amendment)

Key Facts: California required charities to register annually with the State, and to disclose their major donors in connection with such registrations. The State represented that it kept such information confidential, and justified the disclosure requirement as a measure to help it police charitable fraud. Plaintiffs, two charities that promote conservative political causes, challenged the disclosure requirement as burdening their First Amendment rights to associate with their donors. They alleged that donors would be chilled from contributing out of a fear of being subjected to reprisals in an overwhelmingly liberal state.

Issue: Does the donor disclosure requirement violate the charities free association rights?

Held: Yes, the requirement is invalid on its face as failing the exacting scrutiny applicable to laws that burden free association rights. The requirement was not narrowly tailored since ample alternatives exist to police potential self-dealing and fraud, such as investigatory subpoenas. The requirement was more for administrative convenience than anything else.

Dissent (Sotomayor/Breyer/Kagan): Precedent demands that plaintiffs demonstrate a substantial burden on their association rights before courts apply exacting scrutiny, which the majority is essentially overruling. Here, the plaintiffs had no evidence that potential donors were being chilled from contributing to them by the confidential disclosure requirement.

Free Exercise of Religion

FULTON v. PHILADELPHIA (Opinion by Roberts) (First Amendment)

Key Facts: Plaintiff Catholic Social Services (CSS) had long contracted with the City of Philadelphia to be one of its many child foster care placement agencies. After a newspaper story highlighted the facts that CSS would not certify married same-sex couples as potential foster families due to its religious belief that marriage was a sacred bond between a man and woman (CSS would also not certify any non-married couples), the City threatened to cancel CSS's

contract unless it complied with the City's non-discrimination policies and certified same-sex couples. CSS sued to enjoin the City's action.

Issue: Does the application of the City's non-discrimination requirements to CSS violate its free exercise of religion rights?

Held: Yes. Under the 1990 *Employment Division v. Smith* decision, religious exemptions from laws are not constitutionally required where a law is not discriminating against religion and is generally applicable to all. However, here Philadelphia's non-discrimination law contains a provision permitting the City to make exceptions to that law (even though an exception has never been granted). Hence, the law is not generally applicable and the refusal to give CSS a religious exemption must be reviewed under strict scrutiny. That requires the City to prove it has a compelling reason for denying CSS an exemption on religious grounds. This it cannot do because giving CSS an exemption would only help the City by increasing the number of its providers, and its asserted interest in preventing discrimination is undermined by the fact that its law does permit exemptions to be made.

Concurrence in judgment (Gorsuch/Alito/Thomas): The majority maneuvers mightily to find that the City even has a policy of permitting exemptions to its non-discrimination requirements, which it has never used (and will eliminate right after this case—thus subjecting CSS to ongoing litigation). Instead of deciding the case on this strained theory, we should just admit *Smith* was wrongly decided and overrule it. All refusals of the government to grant religious exemptions to secular laws should be subject to strict scrutiny.

Concurrence in judgment (Barrett/Breyer/Kavanaugh): Swapping *Smith's* categorical rule denying religious exemptions for a categorical ruling always granting them under strict scrutiny review, is a perplexing problem which we can leave for another day.

Takings Clause

CEDAR POINT NURSERY v. HASSID (opinion by Roberts) (Fifth and Fourteenth Amendments)

Key Facts: In order to support union organization efforts, California law requires agricultural employers to allow union organizers access to their property for an hour before work, during the lunch hour, and an hour after work, for up to 120 days per year. Plaintiffs produce growers sued, claiming that the regulation effected a taking of their private property for public use, for which the govt owed just compensation under the Fifth and Fourteenth Amendments.

Issue: Is the California access regulation a *per se* compensable *physical* taking, or is it a *regulatory* taking to be evaluated under the *Penn Central* factors as to whether a taking has occurred and compensation is owed?

Held: The regulation is a physical taking that is *per se* compensable without regard to the *Penn Central* factors. Even though it is a mandated access regulation, it is essentially a physical taking since the right to exclude others is the essence of private property.

Dissent (Breyer/Sotomayor/Kagan): Our precedents hold that *regulations* which require property owners to grant access to their property should be classified as *regulatory* takings and assessed under the *Penn Central* factors. There is an exception for regulations that require owners to allow *permanent* occupations such as the installation of a cable tv box, but this is not such a regulation. The majority is revising our precedents and law to strengthen private property rights.

Voting Rights

BRNOVICH v. DEMOCRATIC NATIONAL COMMITTEE (opinion by Alito) (Voting Rights Act and Fifteenth Amendment)

Key Facts: Plaintiff DNC challenged two Arizona voting regulations, claiming that they disparately disadvantage the State's Native American, Latino and Black populations in violation of Sec. 2 of the federal Voting Rights Act. The first requires in-person voters to cast their ballots in their assigned precinct, or else their votes will not be counted. The second prohibits ballot collection by any individual other than certain specified persons. The latter provision was also challenged under the Fifteenth Amendment as being adopted with a discriminatory intent.

Issues: Do the two regulations violate Sec. 2's requirement that voting be equally open, and afford equal opportunity to vote, to all groups? And was the ballot collection regulation enacted with a discriminatory intent?

Held: The regulations do not violate Sec. 2, nor was the ballot collection regulation enacted with a discriminatory intent. As to the former conclusion, Sec. 2 mandates looking at the totality of the circumstances rather than looking solely at disparate impact. Those circumstances indicate that voting is equally open to all groups. Moreover, the court of appeals improperly overturned the district court's factual findings that the ballot collection bar was enacted with a discriminatory purpose.

Dissent (Kagan/Breyer/Sotomayor): Equal "opportunity" is absent when a law or practice makes it harder for members of one racial group, than for others, to cast ballots. And that is what the Arizona regulations do because they disparately impact various groups of minority voters. The majority is on a campaign to narrow the VRA that started with its gutting of Sec. 5 pre-clearance provisions in the 2013 *Shelby County* decision.

Constitutional Structure

In Brief—Two Important Standing Rulings

1. UZUEGBUNAM v. PRECZEWSKI - Does a plaintiff have Article III standing to maintain a Sec. 1983 action in federal court for a violation of her constitutional rights when her sole claim for relief is nominal damages? Yes. Even though a requirement of standing is that a favorable ruling would redress a plaintiff's injuries, at English common law nominal damages were viewed as redressing a plaintiff's injury.

2. CALIFORNIA v. TEXAS – Did Texas and other states, and two individuals, have Article III standing to bring a federal court challenge to the constitutionality of the Affordable Care Act requirement that individuals purchase health insurance, after Congress reduced the penalty for non-compliance to $0? No, since the plaintiffs' alleged injuries consisting of out-of-pocket costs resulting from the individual mandate are not being caused by (or fairly traceable to) the allegedly unlawful acts of the government. Since the penalty is $0, the individual mandate is not enforceable by the government.

Important "Shadow Docket" Rulings (two related to Covid-19 Regulations)

1. TANDON v. NEWSOM: Five conservative justices (including the three latest President Trump appointees) forming a majority to grant an application to enjoin enforcement of a provision of California's covid regulations limiting religious gatherings held in homes to no more than three families. In a *per curiam* opinion, the majority explained that strict scrutiny applies whenever the government treats *any* comparable secular activity more favorably than the religious activity at issue. And here the majority explained that strict scrutiny of the home religious gathering restriction applied because California treated stores and businesses more favorably by not restricting their numbers. It also explained that strict scrutiny was not met because mask and distancing requirements could also be imposed on home religious gatherings.

Roberts, Breyer, Sotomayor and Kagan would have denied the application, with the latter three filing a written dissent arguing that home gatherings did pose a greater health risk because covid mitigation measures were not likely to be used and enforced as much as they would be in businesses open to the public.

2. ALABAMA ASSN. OF REALTORS v. DEPARTMENT OF HEALTH AND HUMAN SERVS.: This time Roberts joined the five other conservative justices to enjoin enforcement of the Center for Disease Control's most recent moratorium on the eviction of renters, ruling that the CDC likely lacked authority to issue the moratorium pursuant to the public health statute it relied on.

Breyer, Sotomayor and Kagan dissented, reasoning that the grant of an emergency application requires a demonstrably clear showing of unlawful government conduct which was not met here, and also that the public interest favored leaving the moratorium in place to stem the spread of the covid delta variant pending further legal proceedings.

3. WHOLE WOMAN'S HEALTH v. JACKSON: The new conservative majority declining to enjoin the implementation of a new Texas abortion law that privatizes citizens to sue abortion providers for providing abortions after a fetal heartbeat is detected (around 5-6 weeks of pregnancy), even though the law is in clear conflict with SCT precedent in *Roe v. Wade* and progeny ensuring a right to abortion up until fetal viability (roughly 22-24 weeks into a pregnancy). The majority cited the presence of difficult procedural questions in justifying its inaction.

Roberts, Breyer, Sotomayor and Kagan each filed dissents, with Sotomayor labeling the Court's inaction as "stunning," and Kagan going so far as to call out her colleagues for a perceived

misuse of the "shadow docket."

Preview of Upcoming Term: Shaping Up to be a Potentially Ground-shifting Term both Nationally and Locally for Puerto Ricans

DOBBS v. JACKSON WOMEN'S HEALTH ORG. (Dec. 1 oral arguments): Mississippi passed a law banning abortions after roughly 15 weeks (fetal quickening). Again this is in direct conflict with *Roe v. Wade* and progeny. However, the SCT granted certiorari limited to the question of whether all pre-viability bans on abortion are unconstitutional. Clearly, then, at least some of the justices are willing to reconsider *Roe v. Wade*.

NY STATE RIFLE AND PISTOL ASSN V. BRUEN (Nov. 3 arguments): Like other states, New York has a law requiring people to demonstrate a special self-defense need in order to get a permit to carry a concealed weapon in public. The SCT will consider whether such requirements violate the Second Amendment, and whether individuals enjoy a right to carry a concealed firearm in public for general self-defense purposes. Thus far the SCT has only recognized a right to possess a firearm in the home for purposes of self-defense, so this case could effect a major expansion of Second Amendment rights.

U.S. v. VAELLO-MADERO (Nov. 9 arguments): Here the SCT will consider whether excluding Puerto Rico residents from a supplemental social security benefits program made generally available to residents of every state, as well as District of Columbia and N. Mariana Island residents, violates the Equal Protection Clause.

U.S. v. ZUBAYDAH (Oct. 6 arguments); FBI v. FAZAGA (Nov. 8 arguments): In these lawsuits relating to the conduct of the "war on terror" by the CIA and the FBI, respectively, the SCT will consider the scope of the states secret privilege under which the government may refuse to turn over evidence it believes would harm the country's national security interests.

CARSON v. MAKIN (Dec. 8 arguments): In this case the SCT will consider whether a state that provides tuition assistance funds to secondary public and private schools to educate certain kids, violates the free exercise rights of parents wishing to send their kids to schools that provide religious instruction by barring such assistance to those schools.

AMERICAN HOSPITAL ASSN V. BECERRA (Nov. 30 arguments): In this case the SCT will reconsider the *Chevron* deference doctrine, which instructs courts to defer to reasonable interpretations by administrative agencies of ambiguous statutes that it administers.